NO. 342

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1954)

GRADY ALEXANDER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

MOTION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Justices of the Supreme Court of the United States:

Grady Alexander requests reconsideration in the light of intervening circumstances of the Order of November 8, 1954, denying his Application for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas, and respectfully urges that his Petition for Certiorari be considered in the light of the representations made by the Attorney General of Texas in his brief in the "Public School Segregation Cases" filed subsequent to denial of certiorari herein, and as cause why said writ should be granted respectfully shows:

1.

By denial of certiorari herein, this Court permits to stand a holding of the Texas Court of Criminal Appeals that *only* "a member of that (Negro) race . . . could . . . urge . . . discrimination against members of the Negro race" in attacking an indictment returned by a "white" grand jury. Specifically the Texas court held:

> "Appellant, a white man, attacks the indictment, alleging that race discrimination was practiced against members of the Negro race in the organization of the grand jury which returned the indictment. . . . *Not being a member of that race,* appellant could not urge . . . discrimination against members of the Negro race." (Emphasis added)[1]

The instant case stands alone in the history of this court in holding that the race of a citizen asserting a constitutional right determines whether issues of due process and equal protection can be raised. It seems anomalous for the court to here approve a Texas decision holding that *only* Negroes may urge this point, when, in a long line of cases, this court has been at such pains to require that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race". *Cassell v. State of Texas,* 339 U.S. 282 at 286.

If, as held in the *Cassell* case, "The Constitution requires . . . a . . . jury selected *without regard to race*" (Emphasis added); may State courts apply or withhold such requirements depending on the race of the litigant who asserts the right?

If the Constitution "does command that no state purposefully make jury service turn on color" (concurrence in *Cassell's* case, 339 U.S. at 291), how can the state make application of the Constitutional command contingent on the color

[1]Opinion, Texas Court of Criminal Appeals, reprinted in Petition for Certiorari, p. 16 at p. 22.

of the litigant? If jury commissioners "cannot consciously take color into account" in selecting a grand jury before which a charge against a Negro will be lodged, may the commissioners in selecting the grand jury which will consider indicting a "white" leader of Negroes consciously and purposefully exclude 29.9% of the community?

Does the court intend that Smith County, Texas, henceforth have *two* grand juries; one selected from the whole community without regard to race to consider cases against Negroes — and a second, composed only of representatives of the "white" two thirds of the community to consider all "non-Negro" cases?

The Texas court's decision in the instant case gives one race greater rights than another — and runs directly counter to every decided case in this field, all of which hold that the law acts regardless of race or color — not because of it.

Briefs filed in the "Public School Segregation Cases," since denial of certiorari herein, make clear certain matters relevant to the proper disposition of the instant case. One is that "white" men disagree as to the wisdom or propriety of this court's opinions in the Public School Segregation Cases. Out of such disagreements will arise, according to the elected chief law officers of several southern states, "passive resistance," "threats of violence" or "bloody race riots."[2]

[2]Even assuming what experience under this court's decisions in the "White Primary" and college level segregation and other civil rights cases makes abundantly clear, that the majority of the electorate in Texas and the rest of the South is more temperate than their Attorney Generals represent, nevertheless, there are many so imbued with outmoded concepts of "white supremacy" as to attempt to visit discrimination upon either Negroes or those who seed to aid the Negro in the educational and evolutionary process by which equality before the law and in industrial relations is to be achieved.

Is it intended that a Negro caught in the backwash of prejudice directed against Negroes and those who aid him may require that those who seek to jail him be representative of the whole community, while the "white" who seeks to make effective the constitutional prohibition against racially segregated public schools may be jailed by a jury composed only of the portion of the community which is white and which is bent upon maintaining "white supremacy"?

The Texas Attorney General by formal representation to this court in the Public School Segregation cases "warned the U.S. Supreme Court today (November 15, 1954) any attempt to compel desegregation of Texas public schools, except by "gradual adjustment" faces the threat of violence."[3]

None of the briefs in the Public School Segregation Cases suggests that the "passive resistance" or "bloody race riots" will be confined to those whose skin is black. The whole community is affected; white, black or brown, he who seeks to implement this court's decision is the object of opprobium from at least a segment of the East Texas community.

White, black or brown he should be afforded the protection of a jury chosen from the whole community, not just the "white" segment thereof.

3.

The briefs in the Public School Segregation Cases likewise make clear that opposition to integration in education is as

---

[3]Dallas Times Herald, Page 1 lead story headlined: "SCHOOL DESEGREGATION DANGER CITED IN TEXAS." Page 1, Col. 1, Nov. 15, 1954; see also Dallas Morning News, Part 1, p. 6, November 16, 1954. Story headlined: "VIOLENCE PREDICTED IF COURT FORCES SEGREGATION END NOW."

likely to manifest itself against a "white" as a "Negro." Indeed, the social scientist has long recognized that "race" and "class" are not matters of skin color or ancestry, rather they are epithets applied to certain peoples to designate their membership in minority groups.[4]

This is typical of the Texans' attitude toward race. As the Governor of Texas recently observed: "he had less respect for white agitators than the Negro who carries out the agitators' plans."[5] Or, as Smith County Grand Juror Sharp demonstrated in testifying in the instant case, a white lawyer interrogating him in a manner of which he disapproved did not appear to him to be a member of the white race. Specifically, Grand Juror Sharp testified, "Yes, I surely am a member of the white race, are you, you don't act it." (Motion to Quash, p. 132.)

Thus, by the standards of the social scientist, or the Attorney General of Texas, or the Governor of Texas, or Smith County Grand Juror Sharp, identity with the Negro race or class depends not on skin color or ancestry, but on what those

---

[4]Barzun, *Race, A Study in Modern Superstitions* (1937); Benedict, *Race: Science and Politics* (1940); Boyd, *Genetics and the Races of Man* (1950); Boas, *Race, Language and Culture* (1940); Cox, *Caste, Class and Race: A Study in Social Dynamics* (1948); Davis and Gardner, *Deep South: A Social Anthropological Study of Caste and Class* (1941); Dollard, *Caste and Class in a Southern Town* (1949); Fairchild, *Race and Nationality* (1947); Golightly, *Race, Values, and Guilt*, 26 Social Forces 125 (1947); Krogman, *The Concept of Race* in Linton (ed.), *The Science of Man in the World Crisis* (1945); Ashley-Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (1945) and *Statement on Race* (1951); Myrdal, *An American Dilemma* (1944); Odum, *Race and Rumors of Race* (1944); Park, *Race and Culture* (1950); Powdermaker, *After Freedom: A Cultural Study in the Deep South* (1939); Radin, *The Racial Myth* (1934); Wirth, *Race and Public Policy*, 58 Scientific Monthly 302 (1944).

[5]Dallas Morning News, June 11, 1954, page 2, Column 4.

in the community think and feel.* The prejudices which deprive of seats in the jury box or in the grand jury room are aroused not so much by skin color, as by attitudes, speech or actions. The white who associates with, assists or leads the Negro is at once, in the eyes of the dominant portion of the East Texas community, so identified with the Negro as to be in the eyes of the community, worthy of the same treatment as the Negro himself.

We submit that it is not proper for the Texas court to define "class" or "race" in terms of skin color or ancestry, for as we have demonstrated, the findings of the social scientists, the evidence in this record, the public statements of the Governor of the State of Texas, all make clear that "class" or "race" is based on community attitude and social concept rather than on skin color. This being so, it is not proper to turn the Constitution on or off depending on the skin color of the litigant.

The Fourteenth Amendment precludes deprivation or denial of rights there guaranteed to "any person." Petitioner

*Introduction to the sociology of minorities in C. F. Marden's *Minorities in American Society*, American Book Co., N. Y. 1952, page 26 ff.; *Negroes in American Society*, McGraw-Hill Series in Sociology and Anthropology, New York, 1949, pp. 388 ff. Rose, Arnold M., *Race Prejudice and Discrimination*, Knopf, N. Y. 1951, p. 5 ff.; McDonough, Ed. C. and Richards, Eugene S., *Ethnic Relations in the United States*, Appleton-Autry-Crofts, Inc., 1953; W. Floyd Warner, *American Caste and Class*, American Journal of Sociology, Vol. 42, No. 2 (Sept. 1932) pp. 234-237; Hartley, E. L. and Hartley, R. E., *Fundamentals of Social Psychology*, Knopf, N. Y., 1952; Cox, Olive C., *Caste, Class and Race*, Doubleday & Co., Inc., Garden City, N. Y. 1948; Walter, Paul A. F., Jr., *Race and Culture Relations*, McGraw-Hill Series in Sociology and Anthropology, 1952, particularly at p. 13 ff.; Montagu, M. F. Ashley, *Man's Most Dangerous Myth: The Fallacy of Race*, Columbia Univ. Press, New York, 2nd Edition 1945; Schemerhorn, R. A., *These Our People*, D. C. Heath & Co., Boston, 1949, pp. 21 ff.; Rose, Arnold, *The Negro in America*, Harper & Bros., New York, 1948, pp. 31 ff.; UNESCO *"Statement on Race"*, Schumann, New York 1951.

Alexander having white skin stands before the citizens of Smith County as the epitome of all the fancied epithets which make up East Texans' concept of "race."

He, more than one with a darker skin, stands as a symbol of those who would crack established segregation patterns, who would abolish white-black wage differentials, who would lead Negroes in "mixed" organizations, who would raise the economic status of the Negro. Against such a man would necessarily be concentrated the community attitudes, the prejudices, the community resentment of those who believe their experience to justify "white supremacy." Due process and equal protection in judicial determinations involving such a man require inclusion in his jury of "the whole community"; not just that part of the community which has seen fit, since Smith County was organized, to deprive the 29.9% of the community which is Negro, of consideration in the composition of its juries.

The 2/3rds of the county which indicted Alexander, might well have tempered its actions, investigated more fully, checked itself to examine whether its prejudices were showing, had a jury representative of the full 3/3rds of the county considered this case.

WHEREFORE, we respectfully pray that the Petition for Certiorari be granted and the conviction reversed.

Respectfully submitted,

By L. N. D. Wells, Jr.

L. N. D. WELLS, JR.
Counsel for Petitioner
1716 Jackson Street
Dallas, Texas

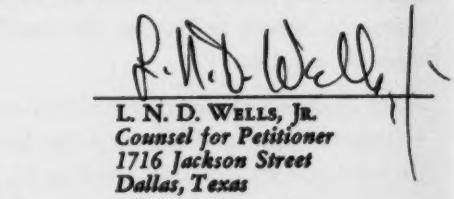
November 24, 1954

MULLINAX & WELLS
OTTO B. MULLINAX
OSCAR H. MAUZY
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

A copy of this Motion for Rehearing of Application for Writ of Certiorari, together with a copy of the letter of transmittal to the Clerk of the Supreme Court of the United States, has been served this date on the Honorable John Ben Shepperd, The Attorney General of Texas, Capitol Station, Austin, Texas, and the Honorable Harry Loftis, Criminal District Attorney, Tyler, Smith County, Texas, attorneys for the respondent, by placing properly addressed copies of the same in the United States mails first class postage prepaid.



L. N. D. WELLS, JR.
Counsel for Petitioner
1716 Jackson Street
Dallas, Texas